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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 SANDRA L. TABER,)
7 Plaintiff,) No. CV-08-5064-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on June 12, 2009. (Ct. Rec. 14,
15 18.) Attorney David L. Lybbert represents Plaintiff; Special
16 Assistant United States Attorney David J. Burdett represents the
17 Commissioner of Social Security. The parties have consented to
18 proceed before a magistrate judge. (Ct. Rec. 7.) Plaintiff filed a
19 reply on May 28, 2009. (Ct. Rec. 20.) After reviewing the
20 administrative record and the briefs filed by the parties, the
21 court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 18)
22 and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 14).

23 **JURISDICTION**

24 Plaintiff protectively filed an application for supplemental
25 security income (SSI) benefits on November 15, 2004, and on
26 December 1, 2004 for disability insurance benefits (DIB), alleging
27 disability as of April 15, 2004. (Tr. 15.) The applications were
28 denied initially and on reconsideration. (Tr. 36-37, 40-43.)

1 Administrative Law Judge (ALJ) Hayward C. Reed held a hearing
2 September 20, 2007. Plaintiff, represented by counsel,
3 psychologist Allen D. Bostwick, and vocational expert Scott A.
4 Whitmer testified. (Tr. 738-805.) On February 1, 2008, the ALJ
5 issued an unfavorable decision. (Tr. 15-31.) The Appeals Council
6 received additional evidence and denied review on August 27, 2008.
7 (Tr. 6-10.) Therefore, the ALJ's decision became the final
8 decision of the Commissioner, which is appealable to the district
9 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action
10 for judicial review pursuant to 42 U.S.C. § 405(g) on September
11 18, 2008. (Ct. Rec. 1, 4.)

12 STATEMENT OF FACTS

13 The facts have been presented in the administrative hearing
14 transcripts, the ALJ's decision, the briefs of both Plaintiff and
15 the Commissioner, and are summarized here.

16 Plaintiff was 43 years old at onset. (Tr. 30.) She has a
17 high school education and three years of college¹. (Tr. 148, 155,
18 759.) Plaintiff has worked as a bank teller, bus driver,
19 substitute teacher's aide, and book delivery driver. (Tr. 761-
20 763.) She testified she can lift 5 pounds or less, sit in a chair
21 10 minutes before having to move, and needs to lay down 1-2 times
22 a day. (Tr. 770, 780.) Plaintiff can stand 10 minutes and drive
23 25 miles. (Tr. 779, 781.) She no longer seeks medical treatment
24 because she has no insurance. (Tr. 768.)

26 ¹Plaintiff's brief states she has only a high school
27 education. The error appears harmless since transferability of
28 skills was not material to the ALJ's determination. (Ct. Rec.
15 at 6; Tr. 30.)

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which

1 compares plaintiff's impairment with a number of listed
2 impairments acknowledged by the Commissioner to be so severe as to
3 preclude substantial gainful activity. 20 C.F.R. §§
4 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
5 App. 1. If the impairment meets or equals one of the listed
6 impairments, plaintiff is conclusively presumed to be disabled.
7 If the impairment is not one conclusively presumed to be
8 disabling, the evaluation proceeds to the fourth step, which
9 determines whether the impairment prevents plaintiff from
10 performing work which was performed in the past. If a plaintiff
11 is able to perform previous work, that Plaintiff is deemed not
12 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
13 At this step, plaintiff's residual functional capacity (RFC)
14 assessment is considered. If plaintiff cannot perform this work,
15 the fifth and final step in the process determines whether
16 plaintiff is able to perform other work in the national economy in
17 view of plaintiff's residual functional capacity, age, education
18 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
19 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

20 The initial burden of proof rests upon plaintiff to establish
21 a *prima facie* case of entitlement to disability benefits.
22 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
23 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
24 met once plaintiff establishes that a physical or mental
25 impairment prevents the performance of previous work. The burden
26 then shifts, at step five, to the Commissioner to show that (1)
27 plaintiff can perform other substantial gainful activity and (2) a
28 "significant number of jobs exist in the national economy" which

1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
2 Cir. 1984).

3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a
5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
6 the Commissioner's decision, made through an ALJ, when the
7 determination is not based on legal error and is supported by
8 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
9 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
10 1999). "The [Commissioner's] determination that a plaintiff is
11 not disabled will be upheld if the findings of fact are supported
12 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
13 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
14 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
15 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
18 573, 576 (9th Cir. 1988). Substantial evidence "means such
19 evidence as a reasonable mind might accept as adequate to support
20 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
21 (citations omitted). "[S]uch inferences and conclusions as the
22 [Commissioner] may reasonably draw from the evidence" will also be
23 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
24 On review, the Court considers the record as a whole, not just the
25 evidence supporting the decision of the Commissioner. *Weetman v.*
26 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
27 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

28 It is the role of the trier of fact, not this Court, to

1 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
2 evidence supports more than one rational interpretation, the Court
3 may not substitute its judgment for that of the Commissioner.
4 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
5 (9th Cir. 1984). Nevertheless, a decision supported by
6 substantial evidence will still be set aside if the proper legal
7 standards were not applied in weighing the evidence and making the
8 decision. *Browner v. Secretary of Health and Human Services*, 839
9 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
10 evidence to support the administrative findings, or if there is
11 conflicting evidence that will support a finding of either
12 disability or nondisability, the finding of the Commissioner is
13 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
14 1987).

15 **ALJ'S FINDINGS**

16 At the outset the ALJ found plaintiff was insured through
17 December 31, 2008, for purposes of her DIB claim. (Tr. 15, 17.)
18 The ALJ found at step one that plaintiff has not engaged in
19 substantial gainful activity since onset. (Tr. 17.) At steps two
20 and three, the ALJ found that plaintiff suffers from mild
21 degenerative disc disease (DDD) of the cervical spine, mild
22 congenital spinal stenosis, L3, L4, and L5; and annular bulging
23 without nerve compression at L4-5 and L5-S1; status post right
24 shoulder rotator cuff repair, times two; pain disorder with
25 psychological factors and a general medical condition; and
26 histrionic personality disorder, impairments that are severe but
27 which do not alone or in combination meet or medically equal a
28 Listing impairment. (Tr. 17, 22.) The ALJ found plaintiff less

1 than completely credible. (Tr. 26.) At step four, relying on the
2 VE, the ALJ found plaintiff is unable to perform past relevant
3 work. (Tr. 30.) At step five, again relying on the VE, the ALJ
4 found plaintiff can perform other work, such as floor, card room,
5 and parking lot attendant. (Tr. 31.) Because the ALJ found
6 plaintiff could perform work, she was found not disabled at step
7 five. Accordingly, the ALJ found that plaintiff is not disabled
8 as defined by the Social Security Act. (Tr. 31.)

9 ISSUES

10 Plaintiff contends that the Commissioner erred as a matter of
11 law by failing to properly weigh the medical evidence and
12 plaintiff's credibility. She alleges that this, in turn, led to
13 the ALJ asking the VE hypothetical questions that did not include
14 all of her limitations. (Ct. Rec. 15 at 8-20.) The Commissioner
15 responds that the ALJ appropriately weighed the evidence,
16 including credibility, and asks the Court to affirm his decision.
17 (Ct. Rec. 19 at 5.)

18 DISCUSSION

19 In social security proceedings, the claimant must prove the
20 existence of a physical or mental impairment by providing medical
21 evidence consisting of signs, symptoms, and laboratory findings;
22 the claimant's own statement of symptoms alone will not suffice.
23 20 C.F.R. § 416.908. The effects of all symptoms must be
24 evaluated on the basis of a medically determinable impairment
25 which can be shown to be the cause of the symptoms. 20 C.F.R. §
26 416.929. Once medical evidence of an underlying impairment has
27 been shown, medical findings are not required to support the
28 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d

1 341, 345 (9th Cir. 1991).

2 A treating physician's opinion is given special weight
3 because of familiarity with the claimant and the claimant's
4 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
5 Cir. 1989). However, the treating physician's opinion is not
6 "necessarily conclusive as to either a physical condition or the
7 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
8 751 (9th Cir. 1989) (citations omitted). More weight is given to
9 a treating physician than an examining physician. *Lester v.*
10 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
11 weight is given to the opinions of treating and examining
12 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
13 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
14 physician's opinions are not contradicted, they can be rejected
15 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
16 If contradicted, the ALJ may reject an opinion if he states
17 specific, legitimate reasons that are supported by substantial
18 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
19 F. 3d 1435, 1463 (9th Cir. 1995).

20 In addition to the testimony of a nonexamining medical
21 advisor, the ALJ must have other evidence to support a decision to
22 reject the opinion of a treating physician, such as laboratory
23 test results, contrary reports from examining physicians, and
24 testimony from the claimant that was inconsistent with the
25 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
26 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
27 Cir. 1995).

28 ///

1 A. Physical impairments

2 Plaintiff contends that the ALJ failed to properly credit
3 the November 6, 2007 opinion of treating physician H. Graeme
4 French, M.D. (Ct. Rec. 15 at 17-19; Tr. 672-674.) The
5 Commissioner responds that the ALJ gave specific and legitimate
6 reasons for discrediting some of Dr. French's opinions. (Ct. Rec.
7 19 at 6.)

8 The ALJ rejected Dr. French's November of 2007 opinion
9 because for several reasons, including: (1) while the opinion
10 references an exam being conducted, the associated office visit
11 note for an "exam" is not in the record; (2) the severe
12 limitations listed in the form are inconsistent with plaintiff's
13 physical abilities noted in the physical therapy records at
14 Exhibit 19F, and (3) the person completing the form appeared to
15 rely heavily on plaintiff's discounted self-reporting, described
16 more fully below. (Tr. 29.)

17 In the 2007 opinion, Dr. French limited plaintiff to carrying
18 up 5 pounds occasionally, opined she would likely deteriorate with
19 increased pain if asked to perform at full time works stress
20 levels, and would likely be absent at least 2-3 days per month.
21 (Tr. 672, 674.) He opined she is not able to perform at
22 production levels "of sorting or production work. Not likely to
23 withstand any full time work." (Tr. 674.)

24 The physical therapy records referred to by the ALJ indicate
25 there were no functional signs of a loss of sensation, "however
26 client reported entire extremity was numb. She was able to use a
27 pen and fill out paper work without complaint or signs of
28 difficulty." (Tr. 334.) Dr. French's opinion indicated

1 plaintiff's use of both hands for repetitive movement in fingering
2 and grasping was limited and reaching was limited to seldom. (Tr.
3 673.) The physical therapy records do not support Dr. French's
4 assessed limitations. Additionally, Dr. French's opinion was
5 given more than three years after onset.

6 To aid in weighing the conflicting medical evidence, the ALJ
7 evaluated plaintiff's credibility and found her less than fully
8 credible. (Tr. 26.) Credibility determinations bear on
9 evaluations of medical evidence when an ALJ is presented with
10 conflicting medical opinions or inconsistency between a claimant's
11 subjective complaints and diagnosed condition. *See Webb v.*
12 *Barnhart*, 433 F. 3d 683, 688 (9th Cir. 2005).

13 It is the province of the ALJ to make credibility
14 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
15 1995). However, the ALJ's findings must be supported by specific
16 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
17 Cir. 1990). Once the claimant produces medical evidence of an
18 underlying medical impairment, the ALJ may not discredit testimony
19 as to the severity of an impairment because it is unsupported by
20 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
21 1998). Absent affirmative evidence of malingering, the ALJ's
22 reasons for rejecting the claimant's testimony must be "clear and
23 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
24 "General findings are insufficient: rather the ALJ must identify
25 what testimony not credible and what evidence undermines the
26 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
27 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

28 The ALJ relied on several factors when he assessed

1 credibility: routine/conservative treatment inconsistent with the
2 degree of impairment alleged, plaintiff's inconsistent statements,
3 a presentation of severity of pain deemed so extreme as to appear
4 implausible to treatment providers, activities inconsistent with
5 degree of impairment alleged, lack of physical findings on
6 examination, and noncompliance with medical advice. (Tr. 26-28.)

7 The ALJ considered plaintiff's testimony, and described it
8 in detail:

9 . . . she stopped working because of mental problems
10 where she would forget what she is saying when she is
11 trying to speak; her short term memory is bad; she has
12 migraines for which [sic] she gets more often daily but
13 the medicine helps but does not take them completely
14 away; has problems with her right hand at times and she
15 has had two right shoulder surgeries. She testified that
16 she has had problems with her knees after she fell and
17 has asked about them repeatedly but was told that they
18 would not worry about them until they get worse. She has
19 had to change shoes daily to make sure they are in a
20 different angle and since Dr. French worked on them
21 yesterday it has caused her to have muscle spasms in her
22 back. She has had pain and swelling and catching in her
23 knees. The pain occurs all of the time and any thing
24 touching her knee to any degree causes her pain and
inflammation. She has to elevate her knee for at least a
half hour or more and put ice on it for 20 minutes. The
claimant testified that she was treated for back pain in
2004 and during that time had gone to the emergency room
8 times within two weeks and was told that she had psycho-
logical pain disorder but after she received pain
medication her pain would go down. She was having severe
muscle spasms and Dr. Colwell was trying to build up her
muscles to help her muscle spasms decrease. She could not
walk and her leg would end up being constricted. She lost
feeling down her leg and groin area and was told that her
sciatic nerve was involved. It felt like being repeatedly
hit in the back with a bat. She has these symptoms at
least three times a week but no longer seeks medical
treatment since she does not have insurance.

25 The last times she tried to get L and I reopened they
26 sent her to someone who told her it was psychological
27 . . . Any touch also hurts her shoulder and down into
28 her rib cage. She tries to relieve her pain with hot
showers, Trazadone, and lies down for naps at least once
or twice a day. She testified her problems cause her
an inability to do her hair and most of the time her
daughter will braid it and it will stay like that for

1 three days. She is unable to do her feet and at times
2 going to the bathroom is difficult. She is unable to do
3 the dishes . . . She spends a great deal of time not
4 being able to get up or get motivated and there are days
5 when she does not get off the couch. When she is unable
6 to get her medication, her anxiety 'goes through the
7 roof' and she is unable to walk because she is so dizzy
8 . . .
9 she can only stand for about 10 minutes at a time before
10 her back starts to tighten and if it tightens up too much
11 she has to lay down. She can only sit for 10 minutes or
12 less. . . [She] can only drive for about 12 to 25 miles
13 . . . She stated that there have been times where she has
14 not gotten out of bed for two weeks at a time.

8 (Tr. 25-26.)

9 When he analyzed plaintiff's testimony, the ALJ first
10 observes that while plaintiff experiences some right shoulder and
11 back pain, the evidence does not show that this is totally
12 disabling, and her treatment [other than the two shoulder
13 surgeries] has been essentially routine and/or conservative in
14 nature. (Tr. 26.) In reaching this conclusion, the ALJ relies on
15 a letter from examining physician John K. Shuster, M.D., to
16 plaintiff opining that her problem "is not in her back and her
17 back was not surgically correctable." Dr. Shuster notes the
18 lumbar MRI essentially shows a little bit of degenerative disease
19 but "absolutely no nerve entrapment whatsoever." (Tr. 26,
20 referring to Exhibit 2F at 7.) He opined plaintiff would probably
21 "just require long term physical therapy." (Id.) Dr. Shuster's
22 letter after the MRI is dated September 29, 2003 -- well before
23 onset.

24 The ALJ considered: (1) treating physician Glenn Bonacum,
25 M.D.'s record that plaintiff had been in a treatment program for
26 her back and it was improving. (Tr. 26, referring to Exhibit 17F
27 at 8 at Tr. 307.) (2) Treating physician Charles Colwell, M.D.,
28 reported plaintiff was significantly deconditioned. The preferred

1 treatment for mechanical low back pain is adequate conditioning to
2 stabilize the lumbar spine, good body biomechanics and weight
3 loss. After reviewing the MRI, Dr. Colwell concurred plaintiff's
4 back problems do not warrant surgical intervention, and her
5 response to rotator cuff surgery was excellent. (Tr. 26, referring
6 to Exhibit 10F at 6 at Tr. 198.) (3) Dr. Bonacum released
7 plaintiff back to work on August 24, 2004. [Four months after
8 onset.] (Tr. 26, referring to Exhibit 17F at 18 at Tr. 317.) (4)
9 A lumbar MRI on December 30, 2005, shows only mild congenital
10 spinal stenosis at L3, L4, and L5, no disc herniation or nerve
11 root compression and L4-5 and L5-S1 annular bulging with no
12 demonstrable nerve root compression. (Tr. 26, referring to
13 Exhibit 27F at 5 at Tr. 619.) (5) Treating chiropractor
14 Christopher Bess, D.C., opined plaintiff could return to light
15 work if required to carry no more than 15 pounds with her right
16 arm. (Tr. 26, referring to Exhibit 20F at 11 at Tr. 351, dated
17 April 19, 2005)[one year post onset.]

18 The ALJ's reason for finding plaintiff less than fully
19 credible with respect to back pain and resulting limitations is
20 fully supported by the record.

21 The ALJ also assessed plaintiff as less than fully credible
22 based on implausible pain presentation. (Tr. 27.) Two of several
23 examples cited by the ALJ include examining physician Scott Van
24 Linder, M.D.'s March 2005 report that plaintiff sat on the side of
25 the examining table thrashing her legs about, which she said she
26 could not control. However, he noted that she was able to control
27 it sufficiently to walk across the room and get up on the examining
28 table. When plaintiff was told he was not set up to provide any

1 treatment or medications, she became tearful and angry and the
2 kicking stopped when she decided to get dressed and leave.
3 Plaintiff left walking out on her own power. (Tr. 27, referring
4 to Exhibit 23F at 17 at Tr. 391.) Another example noted by the
5 ALJ occurred in Dr. Van Linder's office in June of 2005, when the
6 entire examination was carried out while plaintiff whined,
7 whimpered and intermittently cried. When leaving plaintiff claimed
8 she was seized with spasms, hobbled out to the waiting room and
9 collapsed into a chair sobbing and moaning. Dr. Van Linder helped
10 her down to the floor and noted there were no spasms in her back
11 whatsoever. He opined the entire presentation seemed to be a
12 rather gross demonstration of pain behavior with no physical
13 findings to support her subjective complaints. (Tr. 27, referring
14 to Exhibit 23F at 5-6 at Tr. 379-380.)

15 The ALJ's reasons, only some of which are described here,
16 for finding plaintiff less than fully credible are clear,
17 convincing, and fully supported by the record. See *Thomas v.*
18 *Barnhart*, 278 F. 3d 947, 958-959 (9th Cir. 2002)(proper factors
19 include inconsistencies in plaintiff's statements, inconsistencies
20 between statements and conduct, and extent of daily activities).
21 Noncompliance with medical care or unexplained or inadequately
22 explained reasons for failing to seek medical treatment also cast
23 doubt on a claimant's subjective complaints. 20 C.F.R. §§
24 404.1530, 426.930; *Fair v. Bowen*, 885 F. 2d 597, 603 (9th Cir.
25 1989).

26 The ALJ considered the records and opinions of treating and
27 examining doctors when he weighed Dr. French's 2007 opinion. None
28 assessed a degree of impairment similar to Dr. French's.

1 The ALJ's reasons for rejecting Dr. French's assessed marked
2 limitations are specific, legitimate, and fully supported by the
3 evidence. See *Lester v. Chater*, 81 F. 3d 821, 830-831 (9th Cir.
4 1995) (holding that the ALJ must make findings setting forth
5 specific, legitimate reasons for rejecting the treating
6 physician's contradicted opinion).

7 The ALJ is responsible for reviewing the evidence and
8 resolving conflicts or ambiguities in testimony. *Magallanes v.*
9 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
10 trier of fact, not this court, to resolve conflicts in evidence.
11 *Richardson*, 402 U.S. at 400. The court has a limited role in
12 determining whether the ALJ's decision is supported by substantial
13 evidence and may not substitute its own judgment for that of the
14 ALJ, even if it might justifiably have reached a different result
15 upon de novo review. 42 U.S.C. § 405 (g).

16 The ALJ's assessment of the opinions of treating, examining
17 and consulting physicians and of plaintiff's credibility is
18 supported by the record and free of legal error. To the extent
19 the ALJ discounted some of the conflicting medical opinions, his
20 reasons are specific, legitimate and supported by the record.

21 B. Psychological impairments

22 Plaintiff alleges the ALJ improperly discounted the opinions
23 of Patricia Kraft-Rinehart, Ph. D. (Tr. 154-156, **1/8/04**), Ronald
24 Page, Ph.D. (Tr. 252-256, **4/6/05**), and Philip Barnard, Ph.D. (Tr.
25 550-554, **8/28/06**). (Ct. Rec. 15 at 8-12.) Plaintiff alleges the
26 error likely occurred because the ALJ placed greater weight on the
27 opinion of examining psychiatrist Fredrick Montgomery, M.D., and
28 testifying psychologist Allen Bostwick, Ph. D.(Ct. Rec. 15 at 10-

12) than on the other professionals.

With respect to Dr. Kraft-Rinehart's opinion [rendered about three months before onset], the ALJ notes she diagnosed a pain disorder associated with general medical condition and psychological factors and adjustment disorder with depressed mood. (Tr. 20, referring to Tr. 156.) The ALJ notes that on April 30, 2004 (two week after onset), psychiatrist David Bot, M.D., observed "psychiatric treatment by Dr. Kraft has been helpful." (Tr. 20, referring to Tr. 463.)

The ALJ notes Dr. Page opined after his psychological examination plaintiff is conspicuously prone to "hyperbolic and pejorative emphases, spotlighting various somatic complaints and also implying a grandiosity in some contexts." He described her as logical, coherent and well oriented and displayed intactness of recent and remote memory. Dr. Page diagnosed conversion disorder and hysterical personality disorder. The ALJ noted Dr. Page could not entirely rule out malingering as "her presentation is liberally colored by a hysterical communication style, inviting conceptualization within a neurotic dynamic." (Tr. 20-21. Referring to Tr. 255-256.)

The ALJ notes Dr. Barnard administered testing. (Tr. 21, referring to Exhibit 26F.) He observed plaintiff did not appear depressed and her affect was somewhat elevated. (Tr. 552.) He diagnosed pain disorder associated with both psychological factors and a general medical condition, and chronic and histrionic personality disorder features. (Tr. 553.)

The ALJ considered Dr. Montgomery's opinion eight months after onset. (Tr. 20, referring to Exhibit 26F at 122-128.) Dr.

1 Montgomery assessed a GAF of 70, indicating only mild symptoms.
2 (Tr. 597.)

3 The ALJ considered the opinion of the testifying
4 psychologist, Dr. Bostwick:

5 He testified that plaintiff has consistently been
6 diagnosed with a pain disorder associated with
7 psychological factors and a presumed general medical
8 condition. The psychological factors noted in the
9 record include a histrionic behavior, conversion
10 processes and notation of psychogenic pain with secondary
11 gain motivation. The psychogenic pain disorder given
12 throughout the record by several examiners is really an
13 old diagnosis of conscious volitional psychological
14 production of pain (closely related to hypochondriasis
15 in the DSM-IV). This is not an unconscious process
16 that someone has no awareness of or control over.

17 (Tr. 21-22.)

18 Plaintiff argues unpersuasively that the ALJ erred by
19 accepting Dr. Bostwick's opinion. It is the court's view that
20 his opinion is fully supported by the medical evidence and by
21 the ALJ's assessment of plaintiff's credibility. The weight
22 given by the ALJ to the conflicting psychological opinions is
23 supported by the evidence and free of legal error.

24 Plaintiff's final argument, that the ALJ's hypothetical
25 questions erroneously omitted alleged limitations, is subsumed
26 by the preceding analysis.

27 CONCLUSION

28 Having reviewed the record and the ALJ's conclusions, this
court finds that the ALJ's decision is free of legal error and
supported by substantial evidence.

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment (**Ct. Rec. 18**) is
GRANTED.

2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

1 **DENIED.**

2 The District Court Executive is directed to file this Order,
3 provide copies to counsel for Plaintiff and Defendant, enter
4 judgment in favor of Defendant, and **CLOSE** this file.

5 DATED this 18th day of June, 2009.

6 s/ James P. Hutton

7 JAMES P. HUTTON

8 UNITED STATES MAGISTRATE JUDGE
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